

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
INITIAL STATEMENT OF REASONS FOR REGULATORY ACTION
(Pre-publication of Notice Statement)

Amend Section 670.5
Title 14, California Code of Regulations
Re: Animals of California Declared to Be Endangered or Threatened

- I. Date of Initial Statement of Reasons: February 24, 2004
- II. Dates and Locations of Scheduled Hearings:
 - (a) Notice Hearing: Date: February 4, 2004
Location: Sacramento
 - (c) Adoption Hearing: Date: June 25, 2004
Location: Crescent City
- III. Description of Regulatory Action:
 - (a) Statement of Specific Purpose of Regulation Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary:

Section 670.5 of Title 14, CCR, provides a list, established by the Fish and Game Commission (Commission), of animals designated as endangered or threatened in California. The Commission has the authority to add or remove species from this list if it finds that the action is warranted. Currently, coho salmon (*Oncorhynchus kisutch*) north of San Francisco is not included on the list in Section 670.5. Coho salmon south of San Francisco is already listed as endangered under the California Endangered Species Act (CESA).

The proposed regulatory action would add the populations of coho salmon between San Francisco Bay and Punta Gorda, California, to the Section 670.5 list as an endangered species and would add the population between Punta Gorda, California, and California's northern border as a threatened species.

The population between San Francisco Bay and Punta Gorda,

California is part of the Central California Coast (CCC) Coho Evolutionary Significant Unit (ESU) and the population between Punta Gorda and California's northern border represents the California portion of the Southern Oregon Northern California Coast (SONCC) Coho ESU. The designation of ESUs is a federal approach to identifying distinct population segments of Pacific salmon.

In the CCC Coho ESU, recent surveys and monitoring indicate that widespread extirpation or near-extinctions have already occurred within some larger stream systems or over broad geographical areas within the ESU and remaining populations are fragmented. In the SONCC Coho ESU, current information indicates that brood-year representation is approximately 55% in previously identified historic streams (Status Review, Department of Fish and Game, 2002). Decreased stream occupation and fragmentation also occurs north of Punta Gorda but to a lesser degree.

Although coho salmon currently benefits from some protection and management and from habitat restoration efforts, it is threatened by habitat modification and destruction, predation by non-native fishes, and human-related activities. Once added to the Section 670.5 list, Fish and Game Code Section 2080 prohibits the "taking" of a species unless the "take" is authorized pursuant to a CESA authorization or is exempt from CESA's take prohibition. The proposed regulatory change is necessary to avoid further deterioration of coho salmon in the petitioned area.

On April 27, 2001, the Commission published a Notice of Findings in the California Regulatory Notice Register declaring coho salmon a candidate species, which commenced a one-year candidacy period, during which the Department of Fish and Game (Department) evaluated the status of the species. In April 2002, the Department issued a report to the Commission regarding the status of coho salmon north of San Francisco, recommending the proposed regulatory action. On August 30, 2002, the Commission found that coho salmon warrants listing as recommended by the Department.

- (b) Authority and Reference Sections from Fish and Game Code for Regulation:

Authority: Sections 2070 and 2075.5, Fish and Game Code.

Reference: Sections 1755, 2055, 2062, 2067, 2070, 2072.7, 2075.5 and 2077, Fish and Game Code.

- (c) Specific Technology or Equipment Required by Regulatory Change:

None

- (d) Identification of Reports or Documents Supporting Regulation Change:

Petition to list coho salmon as endangered (Thomas J. Weseloh, CalTrout for the Salmon and Steelhead Recovery Coalition, July 19, 2000).

Report to the Fish and Game Commission: Status Review of California Coho Salmon North of San Francisco Bay (Department, April 2002)

- (e) Public Discussions of Proposed Regulations Prior to Notice publication:

Public comments were heard at the August 30, 2002, Commission meeting in Oakland, California, and February 4, 2004, meeting in Sacramento, California. During the candidacy period the Department also solicited comments from landowners and other affected and interested parties.

IV. Description of Reasonable Alternatives to Regulatory Action:

- (a) List entire species as Endangered:

The California portion of the SONCC Coho ESU ranges from Punta Gorda to the Oregon border, occupying both smaller, coastal watersheds and larger river systems such as the Klamath, Trinity, and Eel rivers basins. Although streams supporting coho salmon in the SONCC Coho ESU are fewer than in past decades, available information suggests that the level of extirpation and population fragmentation is not as severe as in the CCC Coho ESU. Also, brood-year presence analysis indicates that the decline in the number of streams supporting coho salmon has stabilized since the mid-1980s. For these reasons, the Department concluded that

the California portion of the SONCC Coho ESU is not presently endangered with becoming extinct. Therefore, the Department does not find that listing the SONCC Coho ESU as endangered is warranted.

(b) List entire species as threatened:

As stated above, coho salmon from Punta Gorda south to San Francisco Bay are highly fragmented and have suffered local extirpations. The Department has concluded that this portion of the CCC Coho ESU is threatened with extinction. Therefore, the Department does not find that listing the CCC Coho ESU as threatened is adequate.

(c) Attempt to bring about protection and recovery through resource management and regulatory actions of federal agencies:

The National Oceanic and Atmospheric Administration (NOAA) Fisheries has listed the California populations of coho salmon as threatened pursuant to the Federal Endangered Species Act (ESA). Specifically, NOAA Fisheries listed the CCC Coho ESU of coho salmon as threatened on December 2, 1996 and listed the SONCC Coho ESU as threatened on June 5, 1997; and therefore, both Coho ESUs have had federal take prohibitions in place since those dates. Under ESA, a threatened species is likely to become endangered in the foreseeable future. Despite the current listing status of the CCC Coho ESU as threatened, NOAA Fisheries' Southwest Fisheries Science Center recently concluded a status review update and found that the CCC Coho ESU is now in danger of extinction, the definition of an endangered species under ESA.

Regardless of a species' status under federal law, "it is the policy of the state to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat..." (FGC, Section 2052).

If listed, coho salmon north of San Francisco will receive the protection from unauthorized take under CESA, violations of which will be punishable under state law. The Department may authorize incidental take under CESA, but the impacts associated with authorizing any form of take will be minimized and fully mitigated according to state standards that may be different than measures required under federal law.

(d) Attempt to bring about protection and recovery through resource management or regulatory actions of other state agencies:

It is the policy of the state that all state agencies, boards, and commissions shall seek to conserve threatened and endangered species and shall use their authorities in furtherance of the purposes of CESA. However, other state agencies generally do not have the authorities or resources necessary to adequately protect or manage species and their habitats. Even if such commitments or actions are forthcoming, the policy of the Legislature is that they are no substitute for the recognition and protection intended by CESA. As such, coho salmon will not be adequately protected through the resource management and regulatory actions of other state agencies.

(e) Decline to List (No Change Alternative):

Failure to officially recognize coho salmon between San Francisco and Punta Gorda as endangered and coho salmon between Punta Gorda and California's northern border as threatened will deprive this species of protection under CESA. In such circumstances, without such recognition, valuable state mechanisms to protect against the continued degradation of the species will not be available. The Commission would fulfill its statutory obligation in adopting the proposed regulation.

(f) Consideration of Alternatives:

In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purposes for which the regulation is proposed or would be as effective and less burdensome to the affected private persons than the proposed regulatory action.

V. Mitigation Measures Required by Regulatory Action:

The proposed regulatory action will have no negative impact on the environment; therefore, no mitigation measures are needed.

VI. Impact of Regulatory Action:

The Administrative Procedure Act (APA) requires state agencies to assess the potential for adverse economic impacts whenever they propose to adopt, amend, or repeal any administrative regulation (see generally Gov. Code, §§ 11346.3, 11346.5). The APA also requires state agencies to adhere to the economic assessment requirements to the extent such requirements do not conflict with other provisions of state or federal law (*Id.*, § 11346.3, subd. (a)).

CESA does not specifically prohibit consideration by the Commission of potential economic impacts that may result from a decision to list a species as threatened or endangered under state law. Yet, the information and criteria by which the Commission is required to determine whether a species should be listed under CESA as threatened or endangered are limited to biological considerations (see, e.g., Fish & G. Code, §§ 2062, 2067, 2074.6). The Office of the Attorney General, as a result, has consistently advised the Commission that it should not consider economic impacts in making findings in the CESA listing context. This recommendation is also based on the fact that CESA is modeled after its federal counterpart and the federal Endangered Species Act specifically prohibits consideration of economic impacts during the listing process. The recommendation is also informed by state case law indicating that economic considerations may not be considered by the Commission when designating a species as a candidate for listing under CESA (*Natural Resources Defense Council v. California Fish and Game Comm.* (1994) 28 Cal.App.4th 1104, 1117, fn. 11).

Therefore, the Commission does not believe it is authorized to take economic impacts into account when considering listings under CESA. However, despite this belief, an analysis of potential economic impacts that may result from the proposed regulatory action on businesses and private individuals is provided below. The analysis is intended to provide disclosure, which is one of the basic premises of the APA.

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the following statutory categories have been made:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability of California Businesses to Compete with Businesses in Other States:

The proposed regulatory action to designate coho salmon between San Francisco and Punta Gorda as endangered and between Punta Gorda and the northern border of California as threatened will afford the species the protections of CESA, which prohibit take, possession, purchase, and sale (herein collectively referred to as "take") of threatened and endangered species, except as authorized by the Department. To the extent businesses are engaged in activities that will take coho salmon, the proposed regulatory action may result in adverse economic impacts directly affecting businesses, including the ability of California businesses to compete with businesses in other states. However, the majority of such activities are already subject to federal take prohibitions under the federal ESA, and therefore, have incurred economic consequences as a result since the federal listings (1996 and 1997).

Where the Department authorizes take of coho salmon that is incidental to an otherwise lawful activity, impacts of the taking must be minimized and fully mitigated, and any such mitigation must be monitored for effectiveness under CESA. Permitting under CESA for incidental take of coho salmon would result in some increased costs when compared to the status quo, which includes the federal take prohibition under the federal ESA.

Potential costs of recovery of coho salmon were identified in the Response to Comments on the Draft Recovery Strategy for California Coho Salmon (*Onchorhynchus kisutch*), Report to the California Fish and Game Commission (January 2004). A currently unquantifiable fraction of these potential costs can be attributed to the listing of the species, as opposed to recovery, if practices result in take of coho salmon under CESA. (Existing practices that result in take under the federal ESA may have already incurred economic impacts.) With regard to potential impacts to timber businesses, costs of proposed policies to guide the issuance of incidental take authorizations were estimated to be \$151-373 million, or stated another way, a reduction in timberland values by an estimated 2.8 to 6.9 percent; a reduction in timberland values, which are valued at \$1,400 per acre on average, by between \$39 and \$97 per acre. However, these estimates assume that all of the recommended timberland management provisions would be applied to every

timber harvesting plan. The Department does not anticipate this will be the case because the proposed policies would be recommended as necessary on a site-specific basis when take of the species would occur or if the California Department of Forestry and Fire Protection were to require them in order to mitigate significant adverse effects on the environment pursuant to the California Environmental Quality Act. Therefore, the Commission estimates that although economic impacts to timber businesses may be significant, they will likely be only a fraction of the estimates described above.

With regard to other businesses engaged in activities such as agriculture, in-stream sand and gravel extraction, construction of roads and bridges, suction dredging, and municipal and domestic water use, there may be some economic impacts if these activities would result in the take of coho salmon under CESA; however, again, a portion of these impacts may have already occurred as a result of the federal ESA listing of coho salmon.

Presently, California ocean and inland non-Indian fisheries are closed by federal and state regulators to the direct harvest of coho salmon. Therefore, there would be no adverse effect from the proposed listing on sectors associated with coho salmon fisheries.

- (b) Impact on the Creation or Elimination of Jobs Within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California:

Given the potential for additional economic impacts as identified above, there may be the potential for adverse impacts on new or existing jobs; however, these impacts are unlikely to cause the elimination of existing businesses in California. Whether these potential impacts actually occur depends upon the extent to which commercial activities result in take of coho salmon under CESA, the level of compliance with the federal ESA, and the costs, if any, of minimizing and mitigating for take under CESA. Therefore, these impacts are difficult to estimate at this time.

In addition, there is the potential for creation of jobs and businesses, or expansion of businesses in California. The public sector may create new jobs as a result of mitigations such as road treatment, culvert replacement, and habitat enhancement. These jobs would likely be created largely in rural counties with high levels of

unemployment. Increased public education could result in increased contributions to the State's Rare and Endangered Species Tax Check-off program, which would in turn provide further funding for management and recovery activities for all listed species.

Private tour operators could also potentially benefit economically from increased tourism, interpretation, and educational activities.

Additionally, private environmental consulting firms could benefit economically from assisting in the development and implementation of mitigation measures.

(c) Cost Impacts on a Representative Private Person or Business:

A representative private person or business may experience economic impacts as described in section (a) above.

(d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

As a project applicant, a state agency may realize costs associated with projects involving the incidental take of coho salmon as described in section (a) above.

The proposed regulatory action is not expected to affect federal funding to the state.

(e) Nondiscretionary Costs/Savings to Local Agencies:

As a project applicant, a local agency may realize costs associated with projects involving the incidental take of coho salmon as described in section (a) above.

(f) Programs Mandated on Local Agencies or School Districts:

None.

- (g) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4:

None.

- (h) Effect on Housing Costs:

None.

Informative Digest/Policy Statement Overview

At its August 30, 2002 meeting in Oakland, California, the Fish and Game Commission (Commission) made a finding that coho salmon north of San Francisco warrants listing pursuant to the California Endangered Species Act (CESA). Specifically, the Commission determined that the coho salmon populations between San Francisco and Punta Gorda should be listed as an Endangered Species and the populations between Punta Gorda and the northern border of California should be listed as a Threatened Species.

The Commission therefore proposes to amend Section 670.5 of Title 14, CCR, to add the coho salmon populations between San Francisco and Punta Gorda to the list of Endangered Species and the coho salmon populations between Punta Gorda and the northern border of California to the list of Threatened Species.

This proposal is based upon the documentation of population declines and threats to the habitat of this species to the point that it meets the criteria for listing by the Commission as set forth in CESA. The Commission is fulfilling its statutory obligation in making this proposal which, if adopted, would afford coho salmon north of San Francisco with the recognition and protection available under CESA.